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In the Supreme Court of the United States

OCTOBER TERM, 1975

NORTHERN CALIFORNIA POWER AGENCY, PETITIONER

v.

FEDERAL POWER COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL POWER COMMISSION IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 25-35) is reported at 514 F.2d 184. The principal order of the Federal Power Commission (Pet. App. 5-13) and its order denying rehearing (*id.* at 16-22) are reported at 45 FPC 1153 and 49 FPC 1103, respectively.

JURISDICTION

The judgment of the court of appeals (Pet. App. 23-24) was entered on March 6, 1975. On May 22, 1975, the Chief Justice extended petitioner's time within which to file a petition for a writ of certiorari to and including July 7, 1975, and the petition was filed on July 3, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and Section 313(b) of the Federal Power Act, 16 U.S.C. 825*l*(b).

QUESTION PRESENTED

Whether the Federal Power Commission properly determined that it lacked authority to remedy the allegedly anticompetitive impact of an agreement between a state agency and a jurisdictional public utility for the purchase and sale of electric energy.

STATUTES INVOLVED

Sections 205 and 206 of the Federal Power Act, as added, 49 Stat. 851, 852, 16 U.S.C. 824d and 824e, are set forth at Pet. App. 1-4.

STATEMENT

1. On June 4, 1970, Sacramento Municipal Utilities District ("Sacramento") entered into contracts with Pacific Gas and Electric Co. ("Pacific") whereby Sacramento agreed to sell to Pacific any excess electric energy from a nuclear generating plant that Sacramento proposed to construct. Sacramento also agreed that it would, under certain specified circumstances, construct a second nuclear generating plant and would sell to Pacific any excess energy from that plant as well. Pacific agreed to provide Sacramento with essential capacity and standby services. In December 1970, Pacific filed the contracts with the Federal Power Commission pursuant to Section 205 of the Federal Power Act, 16 U.S.C. 824d, as amendments to its then effective service agreements with Sacramento.[1]

Petitioner is a public agency composed of 11 California cities that own and operate electric distribution systems and that purchase electric power from Pacific. It filed a complaint with the Commission, alleging that the Sacramento-Pacific contracts were part of an unlawful scheme by Pacific to monopolize the generation of electric energy in northern and central California and that the contracts accordingly violate Section 205 of the Act. Petitioner requested that the Commission hold a hearing on the issues raised in the complaint and urged that the contracts not be approved unless they were amended to mitigate their alleged anticompetitive effects.[2]

[1]Pacific was required to file the contracts with the Commission because its sale to Sacramento was a wholesale sale of electric energy in interstate commerce subject to the Commission's jurisdiction under Section 201 of the Act, 16 U.S.C. 824(b).

The Commission accepted the contracts for filing and dismissed petitioner's complaint for lack of jurisdiction (Pet. App. 5-13). The Commission stated that petitioner's complaint "does not allege rate discrimination, nor does it allege that the proposed rates are unjust or unreasonable" (*id.* at 11). Rather, the complaint asked the Commission "to exercise jurisdiction over the size of [Sacramento's] nuclear generating unit and to allocate the bulk power generated therefrom" (*ibid.*).

The Commission concluded that it "has no such jurisdiction" (*ibid.*). "Sacramento is a public agency of the State of California and not subject to the jurisdiction of this Commission" (*id.* at 9). Moreover, under "Section 201(b) of the Federal Power Act, * * * [the Commission's] jurisdiction does *not* extend to the 'facilities' used for the generation of electrical energy" (*id.* at 10; emphasis in original). Sacramento's nuclear generating unit is subject instead to the licensing jurisdiction of the Atomic Energy Commission (*id.* at 9-10).

[2]The complaint stated (Pet. App. 28-29):

> * * * such contracts may be approved if they are amended to provide (i) for the increase in capacity of Thermal Unit No. 2 to approximately 1,150,000 kilowatts, or such larger size as the parties may agree to, with that portion of the capacity in excess of 830,000 kilowatts made available to * * * [petitioner] for the life of the unit; (ii) for an agreement between [petitioner] and [Pacific] for the use of such increased capacity for reserves, maintenance and overhaul, delivery to [petitioner's] members, and dispositions of surplus; and (iii) for consideration of the possibility of [petitioner] utilizing a part of [Sacramento's] surpluses between the time Rancho Seco No. 1 goes into commercial operation and prior to commercial operation of Thermal Unit No. 2 * * *.

In an order denying rehearing, the Commission stated that, while it "necessarily considers anti-competitive factors" that fall within the scope of its normal regulatory jurisdiction, including its jurisdiction over Pacific's transactions that involve interstate sales of electric energy at wholesale for resale (*id.* at 18), its "regulatory jurisdiction does not include authority to license or certificate * * * nuclear electric generating stations, nor * * * authority to direct the size of a particular generating facility or authority to direct investment control or ownership of a portion of generating unit of one utility by another" (*id.* at 19). Since that is "the essence of the relief which [petitioner] seeks" (*ibid.*), and since the Commission is without authority to grant it, the complaint was dismissed.

2. The court of appeals affirmed (Pet. App. 25-35). It stated, relying on this Court's decision in *Gulf States Utilities Co.* v. *Federal Power Commission*, 411 U.S. 747, that, while "the Federal Power Commission, as other regulatory agencies, must consider the anticompetitive consequences of matters properly before it" (Pet. App. 31), the Commission, in appropriate circumstances, has "discretion to dispose summarily of anticompetitive objections" (*id.* at 33), so long as it provides "a properly reasoned explanation for its summary disposition" (*id.* at 34).

Petitioner "did not allege rate discrimination or that the proposed rates were unjust or unreasonable" and "did not even assert that the proposed rates were somehow a part of [Pacific's] alleged anticompetitive 'scheme'" (*ibid.*). Petitioner "sought only to have the contracts held unlawful unless and until they provided for increased capacity of [Sacramento's] thermal units for [petitioner's] use" (*ibid.*). The Commission, however, "simply does not possess the authority to order such capacity increases in [Sacramento's] nuclear plants" (*ibid.*). In these circumstances, petitioner failed to meet "its burden of showing a reasonable nexus between the alleged anticompetitive scheme * * * and the activities furthered by the * * * contracts filed as rate schedules" (*id.* at 35), and the Commission properly disposed of the complaint summarily.

ARGUMENT

The decision of the court of appeals is correct, and further review is not warranted.

1. Petitioner contends (Pet. 6-10) that the decision below is inconsistent with this Court's decision in *Gulf States Utilities Co.* v. *Federal Power Commission*, 411 U.S. 747. But, as the court of appeals correctly pointed out, *Gulf States* "recognized the Commission's discretion to dispose summarily of anticompetitive objections" in appropriate circumstances (Pet. App. 33). Since petitioner's complaint sought relief that is beyond the Commission's authority to grant, and since it failed to show a reasonable nexus between the alleged anticompetitive activity and matters that are properly within the scope of the Commission's regulatory jurisdiction, summary disposition was appropriate. As the court of appeals correctly suggested, the Federal Power Act does not require the Commission "to investigate that which it has no authority to remedy" (*id.* at 35).

2. Petitioner asserts that this case "is a part of a line of cases by which the Federal Power Commission has sought to disable itself from administering the Act in a manner consistent with the antitrust laws" (Pet. 10). The assertion is groundless. As this Court's decision in *Gulf States* establishes, the proper disposition of antitrust issues by the Commission turns on the specific circumstances of each case; its decisions in this area must, therefore, be judged on the basis of individual records. The record here supports the Commission's action.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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